

**OCT 29 2003**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**CATHY A. CATTERSON**

**U.S. COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

MICHAEL GEORGE KOGIANES,

Petitioner - Appellant,

v.

MEL THOMAS, Warden; et al.,

Respondents - Appellees.

No. 01-16719

D.C. No. CV-99-01261-JWS

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
John W. Sedwick, District Judge, Presiding

Argued and Submitted December 6, 2002  
Submission Deferred December 23, 2002  
Resubmitted October 27, 2003  
San Francisco, California

Before: BRUNETTI, TASHIMA, Circuit Judges, and EZRA\*\*, District Judge.

---

\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* Hon. David A. Ezra, Chief United States District Court Judge for the District of Hawaii, sitting by designation.

Appellant Michael George Kogianes appeals the district court's order denying habeas corpus relief pursuant to 28 U.S.C. § 2254. We previously deferred submission of this case pending the resolution and disposition of the *en banc* case, Peterson v. Lampert, 319 F.3d 1153 (9th Cir. 2003) (*en banc*). We then ordered the parties to brief the import of Peterson and provide the Court with a copy of Kogianes's Petition for Review to the Arizona Supreme Court. After reviewing Kogianes's Petition for Review to the Arizona Court of Appeals and the Arizona Supreme Court, we recognize that Kogianes did in fact exhaust his state remedies. Accordingly, we reverse the district court and remand pursuant to this disposition.

In Peterson, we joined our sister circuits and held that “for purposes of exhaustion, a citation to a state case analyzing a federal constitutional issue serves the same purpose as a citation to a federal case analyzing such an issue.” Id. at 1158. An appellant must exhaust his state remedies by fairly presenting the federal claims to state court. Id. at 1156. In doing so, the petitioner gives the state court an opportunity to act on his federal claim. Id. at 1156-1157. In Arizona, review in the highest court is discretionary. An inmate, however, must still

petition the court for review in order to exhaust his claims. Id. at 1157 (citing O’Sullivan v. Boerckel, 526 U.S. 838, 845, 115 S.Ct. 887 (1995)).

Kogianes alleged ineffective assistance of counsel and due process violation claims to the Arizona Court of Appeals and the Arizona Supreme Court. He cited an Arizona case, State v. Santanna, 153 Ariz. 147, 735 P.2d 757 (Ariz. 1987), which relied upon the Supreme Court’s decision in Strickland v. Washington, 446 U.S. 668 (1984), in support of its ineffective assistance of counsel analysis. He also alleged that the state violated his due process rights when the prosecutor, during closing argument, made statements regarding why one of Kogianes’s attorneys had left the case. Kogianes cited an Arizona case, State v. Salcido, 140 Ariz. 342, 681 P.2d 925 (Ariz. 1984), to support his contention. Salcido is a case with analogous facts which relies on the Supreme Court’s decision in Berger v. United States, 295 U.S. 78 (1935), to supports its proposition that “[i]n criminal cases, a prosecutor has a special obligation to avoid ‘improper suggestions, insinuations, and especially assertions of personal knowledge.’” 140 Ariz. at 344.

Accordingly, we find that Kogianes has exhausted his state remedies and the district court improperly determined that his federal habeas petition was

procedurally barred. This case is reversed and remanded to the district court to determine if Kogianes is entitled to habeas corpus relief.

REVERSED AND REMANDED.